SUPREME COURT OF THE UNITED STATES.

No. 381.

GEORGE A. GARDNER, PLAINTIFF IN ERROR,

vs.

HIRAM BARNEY, COLLECTOR, &c.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said circuit court before you, or some of you, between George A. Gardner, plaintiff, and Hiram Barney, defendant, a manifest error hath happened, to the great damage of the said George A. Gardner, as is said, and as appears by his complaint, we being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place before the justices aforesaid on the first Monday of December, which will be in the year eighteen hundred and sixty-five, that the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and customs of the United States ought to be done.

Witness the honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, this 28th day of February, in the year of our Lord one thousand eight hundred and sixty-four, and of the independence of the United States the eighty-ninth.

[SEAL.] KENNETH G. WHITE,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

2 By virtue of the within writ of error and in obedience thereto, I, Kenneth G. White, clerk of the circuit court of the United States for the southern dist. of New York, do hereby certify that the foregoing pages numbered from one to , inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of George A. Gardner *vs.* Hiram Barney, (the case in the within writ mentioned,) as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this ninth day of March, in the year of our Lord one thousand eight hundred and sixty-six, and of the independence of the said United States the ninetieth.

[SEAL.] KENNETH G. WHITE, *Clerk.*

Filed Nov. 30, 1864.

REC. 381

United States circuit court southern district of New York, of October term, in the year one thousand eight hundred and sixty-four.

GEORGE A. GARDNER
against
HIRAM BARNEY, collector, &c.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Be it remembered that the plaintiff above named, having come here into court, and by Andrew R. Culver, attorney, suggested and given the court now here to understand and be informed that heretofore, to wit, on the eighth day of August, 1864, an action was commenced by said plaintiff against the above-named defendant in the supreme court of the State of New York by the service upon said defendant of a summons pursuant to the provisions and requirements of the code of procedure of the State of New York in such case made and provided, and that the said defendant afterwards, by C. A. Runkle, esq., his attorney, appeared in said action, and that upon proceedings thereafter had the said action then pending in said supreme court was, by writ of certiorari, in due form and according to the provisions of the act of Congress in such case made and pro-
4 vided, removed into this court for further prosecution and trial, and that, pursuant to the requirements of the said writ and of the statute in the premises, the clerk of said supreme court made return to said writ of the proceedings in said action in said court. To each and every of which suggestions the said defendant assents as true.

Whereupon it is ordered by the court that the further proceedings in said action be continued, and the trial of the issues therein be had in this court.

And the said plaintiff thereupon, by Andrew R. Culver, attorney, aforesaid, complains of and declares against the said defendant in a plea of trespass on the case, upon promises set forth in the declaration, in the words and figures following to wit:

United States circuit court for the southern district of New York, in the second circuit, of October term, in the year of our Lord one thousand eight hundred and sixty-four.

George A. Gardner, plaintiff in this action, by Andrew R. Culver, attorney, complains of Hiram Barney, collector of the customs of the United States at the port of New York, defendant, in this ac-
5 tion of a plea of trespass on the case upon promises, &c., for that the plaintiff, on the twenty-eighth day of April, in the year eighteen hundred and sixty-four, entered at the custom-house of the United States in the city of New York, and within the collection district of New York, three thousand one hundred and ninety packages of tea, imported by the plaintiff from China, weighing one hundred and twenty-eight thousand eight hundred and thirty-four pounds, whereon the plaintiff was liable to pay to the United States a duty of fifteen cents per pound, and no more, being at the rate

of duty chargeable under the act of Congress approved on the fifth day of August, in the year eighteen hundred and sixty-one, entitled "An act to provide increased revenue from imports, to pay interest on the public debt, and for other purposes." And the aggregate amount of the duties due and payable upon the said teas was nineteen thousand three hundred and twenty-five dollars and ten cents, and no more; yet the said defendant, without authority of law and against the plaintiff's consent, exacted and levied a duty of twenty cents per pound upon the said teas, making the aggregate amount of duties thereon twenty-five thousand seven hundred sixty-six dollars eighty cents, and the defendant withheld and refused to deliver the
6 said merchandise to the plaintiff until the plaintiff had paid the last mentioned sum, which the plaintiff paid, in order to obtain possession of his said goods, unwillingly and under a protest, which the plaintiff avers was sufficient in law; and afterwards, to wit, on the twenty-eighth day of May last past, the plaintiff, in due form of law, appealed from the decision of the said defendant in the exaction of the said duties to the Secretary of the Treasury, who dismissed the plaintiff's appeal on the ninth day of July last past, and thereupon, and by reason of the premises and of the illegal exaction aforesaid, and the refusal of the Secretary of the Treasury to grant any relief to the plaintiff in the matter of his said appeal, there accrued to the plaintiff a right to have and demand of the defendant repayment of the sum of six thousand four hundred and forty-one dollars seventy cents, with interest thereon, being the excess of duties so illegally exacted of the plaintiff by the defendant, in consideration whereof the said defendant promised to pay the plaintiff the said last mentioned sum, with interest, on demand; yet, though often requested, the said defendant has never paid the same, but hath neglected and still neglects and refuses so to do, to the damage of the plaintiff, as he says, the sum of ten thousand dollars.

A. R. CULVER, *Pl'ff's Att'y.*

7 U. S. circuit court.

GEORGE A. GARDNER
vs.
HIRAM BARNEY, collector, &c.

SIR: Please take notice that a rule has this day been duly entered in the office of the clerk of this court requiring the defendant in this action to plead to the declaration filed therein, of which the within is a copy, within twenty days after service of a copy of said declaration and notice of said rule, or judgment, &c.

Dated Oct., 1864.

Yours, &c.,

ANDREW R. CULVER, *Pl'ff's Att'y.*

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5
$441.70

8 Indorsed: U. S. circuit court. George A. Gardner *vs.* Hiram Barney, collector of the port of New York. Declaration and notice of Andrew R. Culver, pl'ff's att'y, 31 Pine.

Service of a copy of the within declaration is admitted.
Dated Oct. 25, 1864.

C. A. RUNKLE, *Def't's Att'y.*
E. D. SMITH, *Def't's Att'y.*

9 *Plea.*

Circuit court of the United States for the southern district of New York, second circuit.

GEORGE A. GARDNER
vs.
HIRAM BARNEY.

And now the said defendant comes and defends the wrong and injury, when, &c., and says that the plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says that though true it is that the plaintiff made the entry at the custom-house, as in said declaration mentioned, and though true it is that the plaintiff made the payment in his said declaration mentioned under protest sufficient in law to raise the question of the legality of the demand made by the defendant, and appealed from the decision of the defendant to the Secretary of the Treasury, and such appeal was dismissed, as in the said declaration mentioned; yet the defendant says that said tea was liable to a duty of more than fifteen cents per pound, and that the assessment of twenty per cent. so made and exacted by the defendant was duly and lawfully made by him under and by virtue of an act of Congress passed and approved by the President of the United States on the 24th of December, in
10 the year 1861, entitled "An act to increase the duties on tea, coffee, and sugar;" and this the defendant is ready to verify.

Wherefore he prays judgment if the said plaintiff ought to have or maintain his action thereof against him, and for his costs.

E. DELAFIELD SMITH, *Def't's Att'y.*

Indorsed: U. S. circuit court. George A. Gardner *vs.* Hiram Barney. Plea. E. Delafield Smith, def't's attorney.

To A. R. Culver, esq., pl'ff's att'y:

SIR: You will please take notice that the plea of the defendant in the above cause, of which the within is a copy, was this day filed in the office of the clerk of the U. S. circuit court for the southern district of New York.

New York, Oct. 29, 1864.

Yours, &c.,

E. DELAFIELD SMITH, *Def't's Att'y.*

11 U. S. circuit court southern district of New York.

GEORGE A. GARDNER
vs.
HIRAM BARNEY, collector, &c., at the port of New York.

And the plaintiff as to the said plea of the said defendant, by him above pleaded, saith that the said plaintiff, by reason of anything by the said defendant in his said plea alleged, ought not to be precluded from having and maintaining his aforesaid action thereof against the said defendant, because he denies that any act of Congress entitled "An act to increase the duties on tea, coffee, and sugar" was approved by the President on the twenty-fourth day of December, in the year eighteen hundred and sixty-one, authorizing any exaction of twenty cents per pound upon the merchandise of the plaintiff, in his declaration mentioned; and this the said plaintiff is ready to verify. Whereupon he prays judgment and his damages by him sustained on occasion of the non-performance of the said several promises in the said declaration mentioned to be adjudged to him with his costs.

A. R. CULVER, *Pl'ff's Att'y.*

12 Indorsed: U. S. circuit court southern district of New York. George A. Gardner *vs.* Hiram Barney, collector, &c. Replication. A. R. Culver, pl'ff's att'y, No. 30 Pine st.

I hereby admit service of a copy of the within replication. Nov. 2, 1864.

E. DELAFIELD SMITH, *Def't's Att'y*,
P'r BROOK.

13 *Demurrer to replication.*

Circuit court of the United States, southern district of New York.

GEORGE A. GARDNER
vs.
HIRAM BARNEY.

And the said defendant saith that the replication of the said plea of the defendant, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law for the said plaintiff to have or maintain his aforesaid action thereof against the said defendant, and he, the said defendant, is not bound by law to answer the same, and this the said defendant is ready to verify; wherefore, by reason of the insufficiency of the said replication in this behalf, the said defendant prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him.

E. DELAFIELD SMITH,
Defendant's Attorney.

14 Indorsed: U. S. circuit court. George A. Gardner *vs.* Hiram Barney. Demurrer to replication. E. Delafield Smith, def't's att'y.

Filed nunc pro tunc as of Nov. 15, '64.

15 U. S. circuit court, southern district of New York.

GEORGE A. GARDNER
vs.
HIRAM BARNEY, collector, &c., at the port of New York.

And the said plaintiff saith that the said replication, and the matters therein contained, in manner and form as the same are above stated and set forth, are sufficient in law for him the said plaintiff to have and maintain his aforesaid action thereof against him the said defendant; and the said plaintiff is ready to verify and prove the same as the court here shall direct; wherefore, inasmuch as the said defendant hath not answered the said replication, nor hitherto in any manner denied the same, the said plaintiff prays judgment and his damages by reason of the not performing of the said promises and undertaking in the said declaration mentioned to be adjudged to him.

By his attorney, A. R. CULVER.

16 Indorsed: U. S. circuit court, southern district of New York, George A. Gardner *vs.* Hiram Barney, collector, joinder in demurrer. Andrew R. Culver, att'y for pl'ff, No. 30, Pine st.
Filed nunc pro tunc as of Nov. 15, 1864.

17 Therefore the issue above joined is ordered by the court to be tried at a circuit court appointed to be held in the court-room of said court, at No. 41, Chambers street, in the city of New York, on the 21st day of November, in the year one thousand eight hundred and sixty-four, as yet of said October term. And now, on the day and at the place last aforesaid, before honorable Samuel Nelson, judge of said circuit court, come as well the said defendant as the said plaintiff, by their respective attorneys last above mentioned.

And the said issue being then and there duly tried and argued, and due deliberation being had, it is considered and adjudged by the court that the said plaintiff do not recover against the said defendant in this action.

And the said plaintiff in mercy, &c.

Judgment signed this 2d day of March, 1865.

R. E. STILWELL, *Dep. Cl'k.*

18 Indorsed: U. S. circuit court. George A. Gardner *vs.* Hiram Barney. Judgment roll. E. Delafield Smith, def't's att'y. A. R. Culver, pl'ff's att'y.
Filed March 2d, 1865.

19 *Bond for costs.*

Circuit court of the United States of America for the southern district of New York, in the second circuit.

GEORGE A. GARDNER
vs.
HIRAM BARNEY.

Know all men by these presents, that we, A. C. Washington and

Theodore B. Moore, of the city of New York, are held and firmly bound unto the above-named Hiram Barney in the sum of two hundred dollars, to be paid to the said Barney, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the ninth day of March, in the year of our Lord one thousand eight hundred and sixty-six.

Whereas the above-named George A. Gardner has prosecuted a writ of error to the Supreme Court of the United States, next to be holden at Washington, to reverse the judgment rendered in the above-entitled suit, by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such, that if the above-named George A. Gardner shall prosecute his said writ of error to effect and answer all damages and costs, if he shall fail to make his said writ of error good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

A. C. WASHINGTON.
THEO. B. MOORE.

Sealed and delivered, and taken and acknowledged, this 9th day of March, 1866, before me.

KENNETH G. WHITE,
U. S. Commissioner.

[5-ct. int. rev. stamp, cancelled.]

20 UNITED STATES OF AMERICA, *Southern district of New York, ss:*

A. C. Washington and Theodore B. Moore, each being duly sworn, do depose and say that they reside in the city of New York, that they, and each of them, are worth the sum of four hundred dollars over and above all his just debts and liabilities.

A. C. WASHINGTON.
THEO. B. MOORE.

Sworn to this 9th day of March, A. D. 1866, before me.

KENNETH G. WHITE,
U. S. Commissioner.

[5-ct. int. rev. stamp, cancelled.]

I approve of the within bond as to form and sufficiency of sureties. M'ch 9, 1866.

SAM'L P. BETTS,
Judge of the U. S. for Sout'n Dist. of New York.

Filed this 9th day of M'ch, 1866.

21 By the honorable Samuel Nelson, one of the judges of the circuit court of the United States for the southern district of New York, in the second circuit, to Hiram Barney, of the city, county, and State of New York, late collector of the customs of the United States at the port of New York:

Whereas there was lately issued out of the circuit court of the

United States a writ of error, directed to the judge of the said circuit court of the United States, for the southern district of New York, stating that in the record and proceedings, as also in the rendition of the judgment of a plea in the said court before the judge thereof, between George A. Gardner, plaintiff, and Hiram Barney, defendant, a manifest error hath happened, to the great damage of the said George A. Gardner; and whereas, for the correction of that error in due manner, the said writ has been issued, returnable at the next stated term of the Supreme Court of the United States, to be held at the city of Washington on the first Monday of Dec'r next; you are, therefore, hereby cited to appear before the said Supreme Court, at the city of Washington on the said first Monday of Dec'r next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of New York, in the southern district of New York, in the second circuit, the 30 day of Nov., in the year of our Lord one thousand eight hundred and sixty-four, and of the independence of the United States the eighty-ninth.

S. NELSON.

22 Indorsed: George A. Gardner *vs.* Hiram Barney. Citation on writ of error. Due service of a copy of the within is hereby admitted. Ethan Allen, ass't U. S. dist. att'y.

Filed Dec. 9, 1864.

o

No. 106.

SUPREME COURT

Of the United States,

DECEMBER TERM, 1867.

GEORGE A. GARDNER, Plaintiff in Error,

vs.

HIRAM BARNEY, Collector, &c.

BRIEF FOR THE PLAINTIFF IN ERROR.

NEW YORK:
WM. J. READ, LAW AND JOB PRINTER, 98 NASSAU STREET.

1867.

No. 106.

Supreme Court of the U. S.

DECEMBER TERM, 1867.

GEORGE A. GARDNER,
Plaintiff in Error,
vs.
HIRAM BARNEY, COLLECTOR, &c.

BRIEF FOR THE PLAINTIFF IN ERROR.

PRELIMINARY STATEMENT.

THE plaintiff in error brought his action against the Collector of the port of New York, to recover $6,441 70 as an excess of duties paid under protest on an importation of teas. The teas were entered at the Custom House, April 28, 1864. The weight of the teas was 128,834 lbs.; and the plaintiff alleged in his declaration that they were by law liable to a duty of 15 cents per pound only, whereas the Collector exacted 20 cents per pound, without authority of law, thus making the excess above stated. The declaration averred a protest before payment of the duties, and an appeal to the Secretary of the Treasury, which was dismissed before action brought.

The defendant filed a special plea, admitting the entry,

the sufficiency of the protest to raise the question of the legality of the assessment, and the appeal to the Secretary of the Treasury and its dismissal; but averring that the teas were liable to a duty of 20 cents per pound, under an act of Congress, passed and approved by the President, December 24, 1861, entitled "An Act to increase the duties on Tea, Coffee and Sugar;" and concluding with a verification, &c.

The plaintiff filed a replication, denying that any act authorizing the exaction of 20 cents per pound on his merchandise, was approved by the President on the 24th of December, in the year 1861; and concluding with a verification, &c.

The defendant demurred to the sufficiency of the replication, and the plaintiff joined issue on this demurrer.

This issue of law was tried by the Circuit Court (Mr. Justice NELSON, presiding), at the October Term, 1864, and judgment was rendered for the defendant. The single question raised by the pleadings was, whether at the time of the plaintiff's entry, there existed and was in operation an Act approved by the President December 24, 1861, authorising the levy of 20 cents per pound on the plaintiff's teas. To show such an Act, the District Attorney produced from the Department of State a certified copy of a roll, purporting to contain "An Act to increase the duties on Tea, Coffee and Sugar," signed by the President, "December 24," but without the addition of any *year* to the day of the month. A copy of the same roll or bill is printed in the statutes at large, vol. xiii., p. , the editor, or official printer, having there added, in brackets, the [1861] next after the "December 24." The District Attorney further referred to the journals of the two Houses of Congress, to show that a bill, with the above mentioned title, passed those bodies in the month of December, in the year 1861.

It will be assumed on this argument, that this Court, by inspection of the roll in the Department of State, will perceive the defect in the date of the supposed law, as it is indicated in the copy printed in the statutes at large.

In the Court below the question raised by the pleadings, whether an Act was approved by the President, December 24, in the year 1861, authorizing a levy of 20 cents per pound on

teas, was not directly decided; but it was held that by virtue of a joint resolution passed by Congress, January 11th, 1862, the law on which the defendant relied, even if not operative before, was put in operation and was binding upon the plaintiff's entry at the time he made it.

The following is a copy of the supposed law:

AN ACT TO INCREASE THE DUTIES ON TEA, COFFEE AND SUGAR.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled:

That from and after the date of the passage of this act, in lieu of the duties heretofore imposed by law on articles hereinafter mentioned, there shall be levied, collected and paid on the goods, wares and merchandize herein enumerated and provided for, imported from foreign countries, the following duties and rates of duty, that is to say: *First*, on all teas, twenty cents per pound. *Second*, on coffee of all kinds, five cents per pound. *Third*, on raw sugar, commonly called Muscovado or brown sugar; and on sugars not advanced above number twelve, Dutch standard, by claying, boiling, clarifying, or other process, and on sirup of sugar or of sugar cane, and concentrated molasses or concentrated melado, two cents and a half per pound; and on white and clayed sugar, when advanced beyond the raw state, above number twelve, Dutch standard, by clarifying or other process, and not yet refined, three cents per pound; on refined sugars, whether loaf, lump, crushed or pulverized, five cents per pound; on sugars, after being refined, when they are tinctured, colored, or in any way adulterated, and on sugar-candy, eight cents per pound; on molasses, six cents per gallon; *Provided*, That all sirups of sugar, or of sugar cane, concentrated molasses, or concentrated melado, entered under the name of molasses, or any other name than sirup of sugar or of sugar cane, concentrated molasses or concentrated melado, shall be liable to forfeiture to the United States, and the same shall be forfeited.

APPROVED, December 24.

The following is a copy of the joint resolution:

Joint Resolution explanatory of an Act entitled "An Act to increase the Duties on Tea, Coffee and Sugar;" approved twenty-fourth of December, eighteen hundred and sixty-one.

Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled:

That the Secretary of the Treasury be, and is hereby authorized and directed to permit goods warehoused at the date of the passage of "An

Act to increase the duties on tea, coffee and sugar," approved December twenty-fourth, eighteen hundred and sixty-one, to be withdrawn on payment of duties imposed by the Act entitled "An Act to provide an increased revenue from imports, to pay interest on the public debt, and for other purposes;" approved August fifth, eighteen hundred and sixty-one; and to refund any excess of duties above those imposed by said last mentioned Act, which may have been collected on such goods already withdrawn. any laws or parts of laws to the contrary notwithstanding.

APPROVED, January 11, 1862.

The opinion of the Court was delivered by Mr. Justice NELSON, as follows:

NELSON, C. J.—This suit is brought against the Collector to recover back duties upon a large number of packages of tea imported from China in April, 1864, and which were paid under protest. The duties claimed were paid under what purported to be an Act of Congress of the 24th December, 1861, that imposed a duty upon teas of twenty cents per pound, and amounted to the sum of $25,766 80, whereas the importer insisted the duties were chargeable only at fifteen cents per pound, under the Act of 5th August, 1861, amounting to the sum of $19,325 10.

It appears that the Act of Congress imposing the higher duty has no date of the year of the day of its approval by the President. The only date is the 24th December, and on this ground it is insisted that the act is inoperative and void. It provides that, from and after its passage, in lieu of the duties heretofore imposed, there shall be levied on teas twenty cents per pound. The date, as will be seen from the terms of the act, is material in order to give to it effect and operation.

The question, whether the date of an Act of Congress can be proved *aliunde*, was very fully examined, and the authorities referred to on the argument; but, upon the view we have taken of the case, it will not be material to enter upon this inquiry, as we think there is a more satisfactory ground upon which to place the decision.

By a joint resolution passed by both Houses of Congress, and approved by the President January 11, 1862, this Act was referred to by its title as having been passed on the 24th December, 1861, explaining and modifying its provisions. By the act as passed, the increased duties were chargeable, according to the true construction of it, on all teas that had not passed the Custom House, and which were subject to duty from and after the passage of the act. Its operation was not restricted, as perhaps is usual, in the amendment of these revenue laws, to goods imported after its passage. Hence teas already imported, or on board ship, or in warehouses, were liable to this enhanced duty. The joint resolution qualified the act, as respected teas in warehouses at the date

of its passage, and directed that the Secretary of the Treasury permit them to be withdrawn on payment of the duty of fifteen cents per pound under the previous Act of 5th August, 1861, and also directed him to refund any excess of duty, "any laws or parts of laws, to the contrary notwithstanding."

Now, we agree with the learned counsel for the plaintiff, that the mere recital of the title of a former act in a subsequent one, without any words indicating an intent of re-enactment or repeal, can have no such effect; and, if the former act was inoperative for any cause, the recital would not cure the defect. But, if the former act is referred to in the subsequent one, with words indicating an intent to supply an omission, or to amend the same in any particular, then the former is confirmed — the two acts must be taken together, the former must be read with the amendment incorporated into it; and, from the time, at least, of the amendment, must be taken and construed as if the amendment had originally been a part of it. This must necessarily be so, else the amendment itself would be nugatory, and the intent of the Legislature defeated. Hence, if the former act be void and inoperative for any cause, a subsequent amendment virtually, if not expressly, re-enacts it; for, we must take the former act with the amendment both together, as giving expression to the legislative will.

This is familiar doctrine.

Now, looking at the joint resolution of January 11, 1864, it will be seen that it contains something more than a mere recital of the title of the previous act. Its legal effect and operation are changed by limiting the payment of the increase of duties to teas imported after the passage of the act, and it carries out this change practically, by providing for a reimbursement of the excess of duties paid under it previous to the alteration, and concludes with a clause repealing anything in the former act to the contrary.

Although this joint resolution purports to be in explanation of the previous act, it is in effect, an amendment of it, by an alteration of one of its material provisions. But whether viewed as explanatory or as an amendment in the technical sense of the term, it is impossible to say that it was not the intent of the Legislature that the previous act, with the explanation or amendment, should, from that date, operate as a law under which the duties imposed by it were to be collected. If not, why explain or amend it? Why even explain and interpret an Act which the Legislature did not intend should operate as a valid law? It seems to me that, whether the words of the joint resolution be taken as explanatory or amendatory, they indicate an intent of the Legislature, unmistakably, that the act thus explained or amended, shall be a law of the land, and if, for any cause like the present one, the want of a date, it should be deemed inoperative, the explanation or amendment will render it valid, at least from the date of the passage of the same.

As the duties in question were levied in 1864, after the passage of the

joint resolution, upon the grounds above stated, we think the defect in the act relied upon, is not available to the plaintiff.

Judgment for the defendant.

For plaintiff, Mr. Curtis and Mr. Culver; for defendant, District-Attorney Smith and Mr. Lowrey.

BRIEF.

The first question to be determined is that raised by the issue of law made by the pleadings; viz:

IS THERE A STATUTE AUTHORIZING THE LEVY OF TWENTY CENTS PER POUND ON TEAS, APPROVED BY THE PRESIDENT DECEMBER 24, 1861, AND OPERATING UPON THE PLAINTIFF'S ENTRY, MADE APRIL 28, 1864?

This question subdivides itself into two inquiries.

I. Supposing the joint resolution had not been passed, could the supposed law of December 24 have been enforced?

II. If there was no such statute in force before the passage of the joint resolution, did that resolution put it in force as to the plaintiff's entry?

I.

Supposing the joint resolution had not been passed, could this roll, having no date of the executive approval, excepting the day of the month, have been an operative statute, when the plaintiff made his entry?

This question again divides itself into two inquiries.

1st—If a supposed law, which in terms is to operate "from and after the *date* of the passage of this Act," has no other date than the day of the month on which it was signed by the Executive, can it operate as a ststute, or is it simply void by reason of the defect in not fixing any year of its date?

2d—If the defect in the record of the law renders it inoperative as a statute, can that defect be cured or supplied, by any evidence *dehors* that record, of which the

Court can either take judicial notice, or which it can hear by any other kind of proof.

It is maintained on the part of the plaintiff in error:

1st. That a record of a law, purporting to have been approved by the President, must itself show a full date of the year and day of such approval, or it is not an operative statute.

The Constitution requires every bill to be presented to the President for his approval, before it can become a law.

A bill becomes a law,

1st—By the President's approval.

This is the exercise of the will of the third branch of the legislature *after* the two other branches have signified their will.

2d—By the constitutional exercise of the will of the two houses of Congress, expressed by a two-thirds vote, *after* the President has refused his assent.

3d—By the constitutional fiction, or presumption, that the President is presumed to have assented, if he does not dissent, in ten days from the time of receiving the bill.

Each of these modes of enacting a law requires its special record, to authenticate its passage and the date of its passage.

Each of the steps of legislation must be ascertained by the record appropriate to that step; each of the bodies concerned in legislating must make its own record; and that record must ascertain the date of the step taken, in order that the Constitution shall be executed according to its intent.

These essential dates, without the ascertainment of which the Constitution connot be executed, may be four in number, according to the requirements of the case.

1. The date when a bill is presented to the President fo his approval.

2. The date of his approval, if he approves it.

3. The date at which it is passed by the two Houses, if the President refuses to sign it.

4. The date of the adjournment of the two Houses, when the bill has not been returned by the President within ten days of the time when he received it. If the adjournment happens within the ten days, the bill does not become a law, unless the President signs it at some time. If it happens after the ten days, the bill becomes a law, although the President may not have signed it.

N. B. I am not aware that any precedent or legislation has yet determined how the date of a law is to be fixed, which has become a law in the mode last mentioned.

Each branch of the legislative power must make the record which ascertains the date of its own action.

Thus of the above-mentioned dates, numbers 1, 3 and 4 must be ascertained, and the record made by Congress.

Number 2, or the date of the President's approval of a law, the record must be made by the President.

In the case of a bill which becomes a law by being passed by two-thirds of each House over the President's veto, the record of the date of such passage, in order to fix the date of the law, must be made on the roll, which is the original.

In the case of a bill which becomes a law by approval and signature of the President, the record of the date of such approval, in order to fix the date of the law, must in like manner be made on the roll, which is the original.

In order to ascertain the character of these originals, or rolls, as records, it will be useful to recur to what was done when the Constitution first went into operation.

When the government of the United States first went into operation under the Constitution, it was necessary to pass certain laws before a permanent place of deposit and custody of the laws could be established. The first Congress, mindful of the injunction of the Constitution that before a bill can become a law it must be approved and signed by the President (unless it is vetoed and passed by the two Houses over the

veto), and careful to provide the means of perpetuating the evidence of the President's approval and signature of the laws, requested President Washington (by resolution) to return all bills when signed by him to the Clerk or Secretary of the House in which they originated, to be kept until a permanent place of deposit and custody could be designated. (*Gales & Seaton's Annals of Congress, 1st Cong., Vol. I., p.* 43.) This was accordingly done, until the Act organizing the State Department was passed, September 15, 1789. This was entitled "An Act to provide for the safe keeping of the Acts, Records, and Seal of the United States, and for other purposes." It directed every bill which had become a law by approval and signature of the President to be forthwith received by the Secretary of State from the President, and provided that "he" (the Secretary), "shall carefully preserve the *originals*, and shall cause the same to be recorded in books to be provided for the purpose." By an Act passed July 7, 1838, so much of the Act of September 15, 1789, as required the Secretary to record the laws in his office was repealed; leaving that part of the last mentioned Act which directed the Secretary to receive and carefully preserve the "originals" in full force. It appears, therefore, from these provisions, that the "original" of a law of the United States is the roll which has been approved and signed by the President (in the case of a law which becomes such by his approval and signature), and has been deposited in the Department of State.

In order to present distinct illustrations of the principle that the "original" of a law, or the roll, must bear the date of that final act of legislative will which makes it a statute, I shall now take the two cases, *first*, of a bill which becomes a law by approval and signature of the President; *second*, of a bill which becomes a law by being passed by Congress over a veto.

In the first case, the President alone makes the record, and he can make it only on the "original;" for the Constitution requires that if he approve the bill he shall *sign* it; and the date of his signature is essential to give it operation as a law, since it is either to change some former law, or is to in-

troduce some new rule. The Constitution leaves it to legislation to determine what shall be done with the bill thus signed by the President; and legislation places it in the State Department, where all magistrates take judicial notice of its contents, and all citizens are bound in like manner to know that it is there. When completed and deposited, this "original" embraces two records, each of which is distinct from the other. One is that of the two Houses of Congress, certified by their presiding officer, declaring their will; the other is that of the President, certified by his signature, declaring his approval. Each is an enacting body, and each is a recording body; each makes its own record. The operation of the double record, when it is complete, makes a statute. The reason why the date of the President's record becomes the date of the passage of the law, will appear hereafter.

In the other case—that of a bill which becomes a law by being passed by two-thirds of both Houses of Congress after a veto, as the date of the passage of the bill is not fixed by the President, who makes no record upon it—it is necessary that Congress should fix that date and make the record of it upon the original, otherwise neither magistrates nor citizens can know when it began to operate as a law. The mode of doing this has been established by a precedent which was very carefully settled This precedent may be found in 5 Stat. at large, page 795. The principle on which this precedent was founded is, that judicial notice of the passage of a statute cannot be taken from the journals of the legislature, but it is taken from the roll itself, which is the record.

Coke Lit., 98*b*; *Comyn's Dig. Parliament R.*, 4.

"The acts of the Legislature," says Starkie, "are records written on the rolls of Parliament, and are of the highest and most absolute proof. * * A public statute requires no proof, and when it is necessary to refer to one, a copy is not given in evidence, but merely referred to, as it were, to refresh the memory."

Starkie's Ev., Part 2, *Sec.* 46, *p.* 161.

My first position therefore is, that the President's certificate on the roll is a record, of the strictest character, and that it cannot be explained, controlled, or aided, by or from any other record, or by any other evidence whatever.

1. That the President's certificate is a record, follows necessarily from the requirement of the Constitution that if he approve the bill he shall sign it, and this includes some statement that he approves it, and has always been so construed in practice.

2. The roll itself, or, as the acts of Congress denominate it, the "original" of a law, is a record of the most solemn character. Whatever methods may be adopted of proving copies of that record, no proof can be admitted to supply what the record does not contain. A law may be construed, judicially, even to the extent of making an ungrammatical sentence grammatical, or of making "and" read "or," if the means of ascertaining the legislative intention exist in the law itself. But if there is a positive omission in a law of what is essential to its operation, the ommission cannot be supplied in a law, any more than in any other record. The principle is familiar to all lawyers that a record imports absolute verity; or, in other words, that it proves itself. A record is of so high a nature, says Lord Coke, that it can be tried only by itself. (*Co. Lit.*, 117*b*.) And that this principle extends by the common law to the records of statutes, is evident from the rule that a statute cannot be proved from a journal of Parliament, but must be proved from the roll, which is the record; and from the further rule, that if it purports to be a general statute, the judges will take notice from the record whether it be a statute or not, and thus the plea of *nul tiel record*, or denial that there is such a record, cannot be interposed. (*Co. Lit.*, 98*b*; *Comyn's Dig. Parliament R.*, 4.) So, too, it has long been held in England, that if an act of Parliament appears from the roll to have been passed without the assent of the Commons, or without the assent of the Lords, or of the

King, it shall be void. But it tt appears to have been passed with the *assent of Parliament* it is a valid statute, because that phrase comprehends the assent of all three of the estates of the realm. *Compn's Dig. Parl. R.*, 3. These principles of the common law appear to have been adopted into our legislation, which makes the bill signed by the President, and deposited in the Department of State, the "original" or record of the statute, as in England the enrollment in Chancery makes the original record of all public acts of Parliament.

If, then, there be in the Department of State a record which purports to contain a general statute, the Judges will take notice of that record, and *on it* will proceed to determine whether it be a statute or not.

3. The date of the executive approval of a bill is an essential part of *his* record, and it is, under our Constitution, and in the modern English practice, *necessarily* the date of the passage of the law. Formerly, in England (prior to 1792-3), all acts took date from the first day of the session; the actual date of the royal assent was not noted on the roll. The effect of this was that great mischiefs followed from the enforcement of the rule that the statutes, although the royal assent was not given until a late period of the session, operated from the first day of the session when no other day was given by their terms. These mischiefs at length culminated in the case of

Latless v. *Holmes*, 4 *Term R.*, 660,

where an act by its terms was to take effect from and after its passage. It was held that the time of its *actual* passage could not be shewn; and that the rule which made the first day of the session the date of its passage being imperative, there could be no relief against its retrospective operation, great as the hardship manifestly was. This led to the act 33, Geo. III. chap. 13, which directed that the *day*, *month* and *year* of the royal assent be indorsed on the roll, and that such indorsement be taken as a part of the act, and

as the date of its commencement, when no other commencement is therein provided. This provision separated the royal assent, in point of legal time, from the time of the assent of the two Houses of Parliament, and thus reversed the rule that the three estates of the legislature were presumed to act concurrently. It is a great advance and improvement in the practice of legislation, obviating all injustice, surprise of the citizen, and embarrassment of the judicial department. The principle on which it proceeds is, that the executive assent is a distinct record; that a law ought not to operate, before that assent is given, through a fictitious assumption that it was given on the first day of the session; and that to prevent this, the actual date of the executive assent must be taken as the date of the passage of the law, and the commencement of its operation, when no other commencement is given.

In some States of this Union, it is believed that the *old* English practice has been continued. But that practice never was adopted in the legislation of the United States, and could not be followed under our Constitution, which in effect introduced here the same practice as that prescribed in England, just after our Constitution, by the Act 53, Geo. III., chap. 13. As the Constitution does not permit any bill to become a law before it has been presented to the President, and requires him, if he approves it, to sign it, those who fixed our first precedents, which have never been departed from, established by them the rule that the President must record the date of his approval, and this must be the date of the passage of the law. The case of *Matthews* v. *Zane*, 7 *Wheaton*, 211, fully recognizes this rule.

I now proceed to state certain principles, which will show that this supposed law was not in operation as a statute, at the time of the passage of the joint resolution.

1. A law which is to operate from the *date* of its passage, and which has yet no date, can have no operation,

especially if its provisions would supersede some former law. The former law remains in operation.

Opinion of the Judges of Massachusetts, 3 Gray, 606–607.

2. In order to make a *date*, the *year*, as well as the day of the month must appear.

All that appears on this roll is "Approved Dec. 24." The inquiry arises after that day has occurred more than once, since a previous law on the same subject was enacted. How is it to be known, judicially, in what *year* occurred that 24th day of December, on which the President signed this roll? The following modes of proof may be suggested.

(*a*) *By parole evidence.* This is out of the question, as it would break in upon the rule that a record must prove itself, and as it would render it necessary for the citizen, when seeking the date of the President's approval of a law, to inquire whether there are living witnesses who can prove that date.

(*b*) *By other records*, such as the journals of the two Houses, showing that at a particular session, a Bill in the same terms was passed by those bodies and sent to the President. This requires an *inference to be drawn*, namely, that the President signed the roll in question, in the month of December of the *same year* in which a bill in the same terms was passed by the two Houses. This breaks down entirely the rule that a record must prove itself, and supplies a defect in it by drawing inferences from another record.

(*c*) *By resorting to the calendar*, under the rule of the common law that the Court may take notice of the calendar, and may regard as fixed whatever the calendar fixes. This rule would afford no aid here, because the 24th day of December occurs in every year, and consequently the calendar of any year, since the passage of the former law which made the duties 15 cents per

pound, would determine nothing as to the year in which the President signed a law making the duties 20 cents. Besides, the common law as to the calendar is, that if the time in question is not fixed by the calendar it must be specially averred and proved; and if the date of a record is the time to be proved, it must be proved by the record.

Some observations on all of the suggested methods of ascertaining the year when this bill was signed by the President may now precede an examination of the roll itself.

That the *year* must be ascertained, in order to give this roll operation as a statute—I refer to

Rex v. *Biers*, 1 *Adol. & Ell.*, 327.
Langley v. *Haynes*, *Moore* 302.
Gibbs v. *Pike*, 8 *Mees & W.*, 223.

That the roll is in all cases the record or "original" of a statute—see

Act of Congress, Sept. 15, 1789.
" " *July* 7, 1838.

That the record of a statute, like all other public records, must prove itself; that the judges can only take notice of it as a statute by being supposed to inspect the roll; that if the contents of the roll are sufficient to make it a statute the judges will take notice of it as such, otherwise they cannot.

See Coke, Lit. 117 *b.*, 98*b.*
Comyn's Dig. Parl. R., 3, 4.
Pacific R. R. v. *The Governor*, 23 *Miss.*, 353.
People v. *Devlin*, 33 *New York*, 269.

These principles are unvarying as to the proof of statutes, and they exclude everything but the record itself, namely, the roll. If the roll itself affords judicial knowledge that this bill was signed by the president on the 24th December *in the year* 1861, the plea which makes the averment that it was signed in that year and on the day mentioned, is sustained; otherwise it is not. This is purely a question of law, to be

tried by judicial notice of the contents of a public record, that record being pleaded as a statute.

Excluding, therefore, everything, but the contents of the roll, we may now examine those contents, to see if they prove the existence of the statute pleaded and relied upon by the defendant.

1. The roll shows that at a session begun in December, 1861, the Senate and House passed this bill. This is certified by the presiding officers of the two houses. But that certificate extends no further. It preceded the final passage of the supposed law, and it neither ascertains nor fixes the date of its passage.

2. The bill was to take effect as a law "from after the *date* of its passage," *i. e.*, from a date to be fixed and certified, not by Congress, but by the President.

This brings us to

3. The President's record. This record shows that he signed the bill on *some* 24th day of December. How is it to be judicially known that this was on the 24th of December, in the year 1861?

It is to be borne in mind that this record of the President, although made on the same parchment on which appears the certificate of the two houses that they have passed the bill, is a perfectly distinct and independent public record. If the President had refused to sign a bill, and had returned it with his objections, and the two houses had not put upon it their certificate that they had subsequently passed it notwithstanding his objections, or had omitted to give that certificate the date of the year and day of such final passage, it could not have operation as a law although the two houses had already certified that they first passed it at a session begun in the month of December, 1861. Whether the final declaration of legislative will proceeds from the President, or from the two houses, the record of that final passage is a record distinct from all other records.

The rule as to the verity of public records excludes all resort to other records, for the purpose of supplying defects,

just as it does a resort to parole evidence, or to anything extrinsic to the record which is to prove itself.

Young v. *Thompson*, 14 *Illinois*, 381.
Elliott v. *Piersol*, 1 *Peters*, 328.

If other records, whether borne upon the same parchment, or existing elsewhere, are to be resorted to, to supply this defect, it will follow that the existence of a Statute law of the land is to be found by drawing inferences and weighing probabilities.

Morally speaking, it may be extremely probable that a bill passed by Congress in December, 1861, and afterwards appearing to have been signed by the President on some 24th day of December, was signed by him on the 24th day of December, in the year 1861. But the statutes cannot rest on probabilities, or be found by drawing inferences. They must prove themselves by the inspection of perfect records; otherwise the citizen has no certain rule to govern his conduct, fix his duties, or ascertain his rights.

Moreover, there is nothing legally conclusive in the inference that may be drawn from the time certified by another record. For, although it is usual for the Executive to sign bills within ten days of the time when they are presented to him, it does not appear when this bill was presented; and even if it was presented in December, 1861, it is not impossible, legally or constitutionally, that it may have been signed in December, 1862. The maxim, *omina rite esse acta presumuntur*, will not aid this case. This will be apparent, by considering what the Court can judicially know in regard to this supposed legislation.

1. The Court knows judicially, from the roll itself, that the bill was passed by the two houses at a sessoin which *began* in December, 1861. But it does not know from that source when the session terminated.

2. The Court does not know judicially at what *period* of the session the bill was passed in Congress, or when it was presented to the President, for the roll does not afford that information.

3. If, looking beyond the roll, the Court can take notice that the termination of the session was before December, 1862, it still knows nothing of the time when this bill was presented to the President, unless it goes to the journals to find that fact, and thence lays the foundation for applying the maxim, *omina rite esse, &c.;* and by the aid of that maxim finds that this bill was signed on the 24th day of December, in the year 1861.

But this maxim in the law of evidence is, in its nature and effect, of a very limited operation. It is, as Mr. Greenleaf remarks, nothing more than the principle of the statute of limitations expressed in a different form, and applied to other subjects.

Greenleaf on Ev., vol. 1, § 20.

The maxim in full is, *ex diuturnitate temporis, omnia presumuntur rite esse acta.*

After a great lapse of time, things *intermediate* in their nature and relations, shall be presumed without proof, if proof is wanting.

This rule was never applied to things final, or which lie at the foundation or origin of a title, a proceeding, or a record.

Stevens v. *Taft*, 3 *Gray*, 487.
Hathaway v. *Clark*, 5 *Pick.*, 490.
Stockton v. *Bishop*, 4 *How.*, 155.
Brunswick v. *McKeon*, 4 *Greenleaf*, 408.

And the whole maxim is applicable only to titles to property.

But to such public acts as legislation, where the validity depends upon formalities that are strictly final, and which constitute of themselves the sole admissible proof that the thing averred has been done, this maxim can not supply defects.

If it could, the foundation of statutes, and recent ones too, would rest on a presumption, instead of the verity of an actual record.

Thus, in England, as we have seen, if the record of a supposed statute does not *recite* that it was enacted by King,

Lords and Commons, it is not a statute, even if it is found as a roll. But if the presumptive maxim, arising from its being a roll, could be applied, it would be a statute, even if it did not contain that recital.

The argument against the existence of the law pleaded, rests on the following positions:

1. That a public record can not be aided by extrinsic evidence of any kind.

2. That the President's approval of a bill is a record distinct from any record made by the two houses.

3. That a law which is to operate from the date of its passage, can only operate from the date of its approval by the President, when the allegation is that it became a law by such approval.

4. That the President alone can make the record which is to show the date of his approval.

5. That if the President's record is defective, in respect to the year when it was made, no resort can be had to extrinsic evidence to supply that defect.

6. That all extrinsic evidence which can be made to surround this case, requires an inference to be drawn in order to find a date for this law; and that such a mode of establishing the existence of a statute is entirely inconsistent with the principles of judicial notice.

II.

The Effect of the Joint Resolution passed January 11, 1862.

The effect to be given to this resolution requires that the validity or invalidity of the supposed act of December 24, 1861, prior to the passage of the resolution, should be determined.

If the previous act was valid and operative without the resolution, the resolution stands in one relation to that act; if the act was not valid and operative, the resolution stands in a different relation.

The resolution was manifestly passed upon the *assumption* that a valid and operative act of Congress was passed December 24, 1861, which, from and after the date of its passage, raised the duty on tea to 20 cents; whereas, it had been 15 cents since the act of August 5, 1861. In order, notwithstanding the assumed passage of the act of December 24th, to permit goods warehoused prior to that date to be withdrawn under the Act of August 5, 1861, this resolution was passed. This was its sole purpose. There is nothing on its face to shew or to suggest that it was passed for the purpose of correcting any defect in the act which it recites, or to reaffirm or reënact any of the provisions of that former act. If we suppose that former act to have been valid and operative, the effect of the resolution is to relieve its application to certain described cases; and it leaves the importations arising after January 11, 1862, to be regulated by the act supposed to have been passed December 24, 1861. But if that former act was not valid and operative, the resolution remains a legislative direction as to what duties are to be levied on goods warehoused on or prior to December 24, 1861; and as to the duties to be levied on goods imported after January 11, 1862, the rate of 20 cents, imposed by the act of December 24, can be held to be rightfully imposed, only by holding that the bare recital of this act by its title and supposed date, in the resolution, operates as a reaffirmation or reënactment of what is otherwise not a perfect and operating statute.

The joint resolution is entitled an "explanatory" resolution; and for the purposes of this question it may be treated as a subsequent explanatory act, undertaking to explain or limit an act which appears on inspection not to have a legal existence. The question is therefore, whether a prior act, which is void for want of a date, becomes operative and valid by a mere recital of its title and its supposed date, in a subsequent act not passed to correct the error, but passed to except certain cases from its supposed operation.

The effect of mere recitals in a subsequent statute upon the provisions and operation of the former recited act, is not by any means a new topic. It is well settled that mere recitals, without enacting or repealing provisions, do not reenact or repeal what is covered by the former act, although such recitals are found in an *explanatory* act. In such cases, the operation of the explanatory act is limited to what it expressly *directs;* and as to all that is covered by the former act, in respect to which no express direction of reënactment or repeal is to be found in the explanatory act, the legislative purpose, notwithstanding any mere recitals in the subsequent act, must be looked for in the former act.

This rule, in regard to the operation of explanatory acts, is believed to be universally applied, and it is a different rule from that which governs acts that are simply in *pari materia*, or cumulative, or repugnant. In the latter class of cases, there may sometimes be what are called implied repeals, which, however, are not favored. But in regard to explanatory acts, reënactments or repeals cannot be implied from mere recitals, unaccompanied by express and affirmative provisions of reënactment or repeal. The operation of the explanatory act is confined to the new rule which it expressly introduces.

Thus, in *Dore v. Gray*, 2 Term R:, 365, where one statute undertook to explain another by reciting that certain cases were not within its provisions, which clearly were so, it was held not to operate as a repeal of the former Act, *pro tanto*, there being no words of repeal.

Upon the same principle, where a repealing act recites the same offence and punishment as the act repealed, the offence and punishment are not saved without a saving proviso.

Scott v. *The Commonwealth*, 3 *Virga. Cases*, 54.

So too a *recital* in a statute of what is not legally true or possible, in respect to a former statute, will not make it legally true or possible. Thus, the modern rule being in England that statutes date from the date of the regal assent, which cannot be in two years of a reign; a former act, though

recited in a subsequent one as passed in two years of the reign, cannot be legally described as an act passed in two years of the reign, but must be described by its true and actual date, notwithstanding such erroneous recital in the subsequent act.

Rex v. *Biers.*, 3 *Mee. & W.*, 475, 1 *Adol. & Ell.* 327.

But on the other hand, where a subsequent act expressly *amends* an *omission* in a former act, both are taken together as one act, and *may* operate from the date of the first.

Att'y Gen. v. *Poxgett*, 2 *Price*, 381.

If these rules are applied to the present case, it will be found that the joint resolution, not being a reënactment of the provisions of the act supposed to have been passed Dec. 24, 1861, but being a mere declaration that goods *warehoused* before the assumed date of that act may be *withdrawn* on payment of the duties fixed by the Act of Aug. 5, 1861, we are necessarily thrown back to the prior acts in order to ascertain what duties are to be paid by goods imported or warehoused *after* Dec. 24, 1861. Now if the supposed Act of Dec. 24, 1861, was not in legal operation prior to the passage of the joint resolution, by reason of its not having a date, how could it derive legal operation from the mere recital of its title and supposed date in a subsequent act, which was not passed to correct any such defect, and which contains no directions as to what duties are to be paid excepting in cases where the goods had been warehoused prior to Dec. 24, 1861? It is manifest that the Act of Dec. 24 can have legal operation as to goods imported after that date, only by holding that the bare recital of its title and supposed date in a subsequent act, is tantamount to a fresh declaration of the Legislative will in respect to those cases on which the joint resolution is entirely silent. Clearly it was not recited for any such purpose.

If the joint resolution, after providing for the cases of goods warehoused before the supposed date of the act of December

24, had gone on to declare that goods warehoused or imported after that date should pay the duties provided in the r cited act, perhaps it might have been argued that after the *date of the resolution*, such goods would have been liable to the 20 per cent. duty. Possibly it might have been contended that such a provision would have been a sufficient description of the goods and of the duties to be assessed upon them when imported after the date recited. But the joint resolution contains no such direction. The sole direction which it contains relates to the duties to be levied on goods warehoused before the supposed date of the recited act; and it recites that supposed date only for the purpose of fixing a date in reference to which certain goods then landed are to pay the duties fixed by the Act of August 5, 1861, and not at all for the purpose of making a fresh provision as to goods imported subsequent to December 24. We are, therefore, necessarily carried back to the supposed Act of December 24, 1861, in order to ascertain what duties are to be paid by goods imported after that date; and if this act, on inspection, is found fatally defective, there is no operative act but the prior one of August 5, 1861.

For I do not admit that it is possible under our Constitution to enact a law by a recital that it has been enacted; or to give anything the force of law by a mere recital that it has that force; or to reaffirm a supposed statute as to one class of cases, by a subsequent act excepting another class of cases from its operation, without expressly reaffirming it as the rule for all other cases, when it was originally defective and inoperative as to all cases.

The reasoning of the Court below, in respect t the effect of the joint resolution, treats it as a case where there was manifested in a subsequent law a legislative intention to supply an omission, or to make an amendment, and puts the two acts together under the common rule that the earlier one must be read as if the amendment had originally been a part of it. The reasoning, therefore, assumes that a legislative intent to affect in a few cases the operation of a former supposed law, which never had a legal existence, amends the defect in such former law which prevented it from having any operation

whatever, and gives the former supposed law full operation as a statute, as to all subsequent cases. The reasoning is this:

The law of December 24th, [1861], was in its terms applicable to goods warehoused on the day of its supposed passage.

On the 11th of January, 1862, Congress declares its will, after reciting the former supposed act, to be, that goods warehoused on the supposed date of the passage of that act, may be withdrawn on payment of the duties fixed by the law of August 5, 1861.

This is held to have made the supposed law of December 24, operative as a statute.

But it may be respectfully asked, what intent is there, here, to supply an omission, or to make an amendment, in respect of the *defect* which rendered the former supposed act *wholly void?*

Even if we suppose that the original law, had it been valid as a law, would have applied to goods warehoused at the date of its supposed enactment, the subsequent act or joint resolution is no confirmation, reënactment, or reaffirmance, expressly or virtually, of any of its enacting provisions.

All that can be said is, that the Legislature, assuming that there existed such a statute as they recited, intended to affect its operation as to a few cases; when, in fact, it had no legal existence, either in respect to those cases, or any other.

Again: It is said in the reasoning of the Court below, that we must read the former act as if the amendment made by the subsequent one had been originally incorporated in it. Suppose it had been, would that have cured the want of a date, or have made it a statute operating as such from and after the date of its passage? The amendment might have been put into the original act, and then the w ole would have been inoperative, if the objection of want of a date is rightly taken.

Further: it is asked, in the opinion of the Court below, if it was not the intent of the Legislature to have the recited act operate as the law of the land, when they explained or

undertook to limit its operation, *why* did they explain or undertake to limit its operation? The answer is, that it is a clear case of legislative mistake. Congress, on the 11th of January, 1862, did not intend to cure any defect rendering that former law inoperative, or to reaffirm it, because it was defective. It is manifest on the face of the joint resolution, that Congress did not, in fact, know of the defect which rendered that law inoperative. If the defect had been, that the President had never put his name on that roll at all, the joint resolution might have been passed exactly as it was, and the reasoning of the Court below would have been equally applicable.

It is respectfully submitted that the principle which puts together an explanatory or amending act and the former act, and treats them as one, is inapplicable to the present case. It is undoubtedly true, that where a subsequent act is passed at the same session. expressly to supply an accidental omission in a former one, the first act operates as amended, from its date, just as if it had not originally had that defect.. Such was the c se above cited, of

The Attorney-General v. *Pouget*, 2 *Price*, 381.

But when was this rule ever carried beyond its own terms, or beyond making the former act read as it reads when amended in respect of the omission supplied? Or when was the rule ever supposed to extend to the making of a statute, by an effort to amend it, not in respect to a defect which made it wholly inoperative, but in respect to something which, if it had existed in the original act, would not have obviated the defect that rendered it wholly void.

In the present case, the amendment when incorporated with the original act, leaves that act just as defective as before, in consequence of the want of that which, under the Constitution and the principles of judicial knowledge, is essential to its existence and operation as a statute. It is a well-settled principle, in the comparison of statutes, that there must be something for the subsequent law to operate upon, before it can be held to have affected the previously existing state of legislation.

Thus, where a statute contained a provision, saving from its repealing clause a former statute that had been already repealed, it was held that such saving provision was a nullity; PARKER, *C. J.* saying that the Act had nothing to operate upon when it was passed.

Ashley, Apellant, 4 *Pick.*, 21.
Confirmed, Ballard v. *Ballard*, 5 *Pick.*, 527.

E converso, where a repealing statute expressly repealed all acts inconsistent with its provisions, it was held not to have had any effect on acts which were inconsistent only with a clause in the repealing statute that was void for unconstitutionality. SHAW, *C. J.*, said that the repealing statute was to be construed as if the void clause were not contained in it.

Sullivan v. *Adams*, 3 *Gray*, 476.

These two decisions rest upon one and the same principle that governs the comparison and construction of statutes. If a subsequent act was intended to affect former legislation, there must be something in existing legislation, on which it can operate, otherwise it can have no operation, being a mere legislative improvidence, or mistake. So, too, if the legislature, from improvidence or error, exceeds its constitutional power, its intent to affect former legislation, manifested in a clause that is wholly void, is a mere nullity, and the former legislation stands unaffected.

It is not perceived in what way an amending or explanatory subsequent law can, in this respect, differ from a repealing law. It may be conceded, that the words of the joint resolution indicate a legislative intent to relieve certain cases from the operation of the former supposed law; but it is not on that account to be admitted that the supposed previous law could thus be made valid and operative, even after the date of the resolution. If there is no existing law to be amended or explained, the intent to amend or explain by a subsequent law which contains no words of reënactment of the provisions, must be regarded as a case of legislative improvidence or mistake.

Whether the resolution undertakes to amend, to explain, or

to repeal, *pro tanto*, all that can be done by putting the two together, is to insert the provisions of the joint resolution into the body of the supposed former act, and still that act remains inoperative as before, because no such act with the supposed date and the recited title exists.

Some stress is laid, in the opinion of the Court below, upon the words of the joint resolution, which direct the Secretary of the Treasury to refund the excess of duties, "any laws or parts of laws to the contrary notwithstanding." The argument of the learned Judge is, that this clause is in the nature of a repeal of the law which Congress assumed to have been passed on the 24th of December, 1861; and that Congress have thus done something more than merely to recite the former Act: that they have repealed it in part, or as to certain cases. But if the principle is sound, that a law already repealed is not revived by a subsequent statute saving it from repeal, because there is nothing for the subsequent statute to operate upon; and that a void repealing statute does not affect previous valid and otherwise operating legislation, because there is no force in the repealing statute; how can it be said that a legislative intent to repeal *pro tanto* a law that does not exist, puts in operation for all other cases, as a statute law of the land, a record or roll, that does not prove itself to be a statute? If the joint resolution had directed the Secretary of the Treasury to levy twenty cents per pound duties on teas imported after its date, or if it had contained any words of reënactment of the former supposed law or its provisions, the case would have been different. But the joint resolution is, at the utmost, but an attempt to repeal *pro tanto*, a supposed former law which did not exist as a law; and the legal effect of this is very different from confirmation or reënactment of its provisions.

The rule for construing statutes, by putting together those in *pari materia*, and from a subsequent statute finding the intent of the Legislature, and applying it to the *construction* of the former act, necessarily supposes that there *is* a former act, which requires to be construed. But this rule has no application to the means by which a supposed former act, that is wholly void, is to be made operative. If there is an

omission which is of such a nature that it can be supplied by amendment, or if there is a doubtful meaning, a law that is in itself operative as a law, can be amended or explained by a subsequent one. But no subsequent repealing or amending statute can affect that which does not exist, nor can the Legislature make a law that is wholly inoperative an operating statute, by erroneously assuming its legal existence, and proceeding to amend or repeal it in part. In such a case, the legislative intent to have the provisions of the recited and supposed law operate as a statute, is not manifested and evidenced in the mode and forms required by the Constitution, and the principles of judicial knowledge of statutes. In the present case, the defective roll may have been presented to the President, and he may have signed it. But there is no possible means of judicial knowledge that he signed it on the 24th day of December, in the year 1861. The joint resolution was presented to the President, and he signed it January 11, 1862. But it contains no directions that 20 cents duties are to be levied on teas after January 11, 1862; and as it merely refers to the supposed law of December 24, 1861, there is no means by which the Court can judicially know that a bill, exacting 20 cents duties on teas, and displacing the previous duty of 15 cents, was signed by the President on the 24th of December, 1861, or that in contemplation of law such a bill was signed on the 11th of January, 1862.

But there is still another answer to the view taken of this joint resolution by the Court below, which would seem to be conclusive. It was treated as manifesting unmistakably, the legislative will that the Act of December 24th, should operate as a law of the land; and it is asked, if Congress did not have this intent, why did they undertake to amend or explain that act? The argument assumes that the supposed Act may have been inoperative and void as a statute; and from the legislative intent to have it operate as law, inferred from an effort to amend it or affect its operation as to certain cases, the conclusion is reached that it is virtually, if not expressly, reënacted as to other and future cases. This virtual or express reënactment, by force of the resolution, is founded, in the argument of the Court below,

upon the intent of the legislature to have the provisions of the void Act, from the date of the resolution, "operate as a law under which the duties imposed by it were to be collected;" and this intent is argued from the fact that Congress undertook to amend or explain the act in question.

I have always supposed that the joint resolution, if it was to affect this case at all, must do so on the ground that it is a reënactment: for it is impossible that a law inoperative and void as a statute, for any cause, can become operative and valid as a statute excepting by reënactment of its provisions. The argument, therefore, of the Court below, is not carried to an extent greater than was necessary. It reaches the conclusion, that the provisions of the act of December 24 are reënacted by the resolution of January 11, 1862, as to future importations. This is necessary to be maintained, if judgment is to be given for the defendant in the action.

The argument supposes therefore that the Act of Dec. 24 was inoperative as a statute; but that it contained provisions which Congress reënacted by the effect of the resolution of Jan. 11, 1862. If this was a reënactment of those provisions, or an enactment *de novo*, it was a laying of duties by resolution of Congress; and this, I maintain, can be done only by bill.

The Constitution makes a clear distinction between "bills" and "orders," "resolutions" or "votes." All these terms are found in the Constitution, and they all had a known significance when the Constitution was adopted, which had been affixed to them for ages. Legislation by bill is a different form of proceeding from legislation by resolution; and the Constitution recognizes this difference.

Art. 1, § 7, of the Constitution, which provides that every "bill" shall be presented to the President, and directs in what mode it may become a *law* if he does not approve it, also provides, by a distinct clause, that every "order, resolution or vote" to which the concurrence of both Houses is necessary (except on a question of adjournment) shall, before it *takes effect*, be approved by the President, or being disapproved by him, shall be repassed by two-thirds of the Senate and the House, "according to the rules and limitations pre-

scribed in *the case of a bill.*" These distinct provisions, placing "bills" in a separate classification as things which are to become *laws*, and "orders, resolutions and votes" in another classification as things which are "to take effect," not only indicate a purpose to have the enactment of statutes proceed by bill, but they show that a resolution is not a bill.

If Congressional practice has led to the use of resolutions, which, for some purposes, when passed through the forms required by the Constitution, have the force of law—as for the special purpose of construing enacted laws, or supplying defects, or relieving particular cases from their operation, or making grants to individuals, or releasing them from claims —*there is no instance, from the origin of the Government to the present day, in which a duty or tax has been laid by resolution, intended to operate as a general law.*

The reason is obvious. The Constitution, in order to introduce and perpetuate the principle that laws of supply shall originate in that branch of the Legislature which is the immediate representative of the people, provided that "*All bills for raising revenue* shall originate in the House of Representatives." Now, although it might be argued that the term "bills" in this clause is general, and might comprehend a "resolution" for raising revenue, originating in the House of Representatives, yet there is no instance in the Constitution in which the term "bill" is confounded with "resolution," or comprehends "resolution." Separate provisions are made for the enactment of laws by bill, and for the taking effect of orders, resolutions and votes. When, therefore, the Constitution, in providing for the enactment of a particular class of laws, namely, laws passed in pursuance of the power to lay and collect taxes, duties, &c., speaks of *bills* for raising revenue, the just inference is that revenue is to be raised only by *bill.* For, if it had been intended that Congress might raise revenue by an order, a resolution or a vote, the Constitution, in describing this class of laws would naturally have said—"All bills, orders, resolutions or votes for raising revenue, shall originate," &c. This it has not said.

It has said that all *bills* for raising revenue shall originate in the House of Representatives; and as it makes throughout

the section a clear line of demarcation between *bills* and *resolutions*, it is not a consistent construction to suppose, that when it described inchoate laws for raising revenue as *bills* for raising revenue, it meant to include in that category *resolutions* or *votes* for raising revenue.

It is true enough that a resolution or vote for raising revenue might be first introduced in the House of Representatives, and the proper evidence of that fact might be perpetuated. But the question is, whether the Constitution can properly be construed as authorising legislation for raising revenue in any other form of proceeding than by bill. That it never has been so construed in legislative practice, affords very strong proof that such a construction would not be a correct one. It was the manifest purpose of the Constitution to describe inchoate revenue laws as "bills," and not to include in that term votes or resolutions for laying taxes or duties.

I submit therefore that the foregoing is an additional reason for not construing the joint resolution of January 11, 1862, as a reënactment, or an enactment *de novo*, of the provision that 20 cents per pound shall be levied as a duty on teas, in lieu of 15 cents which had been imposed by the Act of August 5, 1861. Regarded in this light, the joint resolution is a law for raising revenue; for if the defective law which it is supposed to have amended or explained was not operative, the additional duty could have been imposed only by a fresh enactment, or by what is tantamount thereto.

It is not intended by this point to admit, that the joint resolution contains any enactment at all applicable to future importations. It is contended, on the contrary, that it evinces no legislative intent to make any fresh declaration of the legislative will, excepting that it erroneously *assumes* a law to have been approved by the President December 24, 1861, which raised the duties to 20 cents, and then undertakes to except certain cases from its operation. This is not reënactment, by amendment or any other process. It is simply a legislative mistake as to the existence of the statute described.

Finally, I submit that the joint resolution was manifestly passed to relieve one or more individual cases from the

operation of a former supposed public statute. It is of a class of reliefs frequently given, and generally given by resolution, by which the Executive Department is "authorized to *permit* ' certain cases to be excepted from the operation of a standing, general statute. Such legislation does not affect or modify the provisions of the statute referred to. It is a mere direction to the Executive Department to *permit* certain things to be done, if certain parties shall ask to have them done; and it does not command that they necessarily *shall* be done. It is, therefore, worthy of very careful consideration, how far resolutions granting this particular kind of individual relief, are to be classed in the category of subsequent statutes, which are to be read as modifications of the previous statutes from which they permit certain cases to be relieved. It is of no importance that this resolution is entitled an "explanatory" act. It explains nothing in the former supposed law, under which, if it was valid, the goods that were warehoused on the 24th of December were still liable to the 20 cents duty, *unless* the owners should claim the privilege, authorized by the resolution, of withdrawing them on payment of 15 cents. The construction of the former supposed law is not changed by the resolution. If, rightly construed, it subjected goods warehoused on the day of its supposed passage to the duty of 20 cents, that construction remains good after the passage of the resolution, and the Secretary of the Treasury is merely authorized to *permit* the owners to take their goods on payment of the previous duty of 15 cents, *notwithstanding* the exaction of the supposed law of December 24th.

A reversal of the judgment of the Court below is therefore asked upon the following grounds:

1. That at the time of the passage of the joint resolution, there was no operative statute approved by the President December 24th, 1861, levying a duty of 20 cents on tea.

2. That the reference to such a supposed statute, in the joint resolution of January 11, 1862, was a mere legislative mistake, and the resolution was not passed with any intent to correct the defect which rendered the former supposed law inoperative.

3. That the defect in the former supposed act, which rendered it void, was not one that could be cured by a subsequent amending act, even if Congress had clearly intended to reach it by a legislative amendment; because it was a failure on the part of the President to fix the date of the passage of the law, and when that failure has occurred, the date could not be ascertained or fixed by subsequent legislation.

4. That the joint resolution, if it is to be construed as an amending statute, which, taken in connection with the former supposed act, levied 20 cents duty on importations made after the date of the resolution, is a laying of duties by resolution, when they can constitutionally be laid only by bill.

5. That the joint resolution contains no directions as to what duties are to be levied after its date; and if there was no existing law, passed December 24, 1861, which authorized a levy of 20 cents, the authority given in the resolution to permit goods warehoused at that date to be withdrawn under the Act of August 5, 1861, is not a reënactment of the void provisions of the defective law of December 24.

6. That the rule which puts together a subsequent amending act and a former act, and makes them operate as one, is limited to cases where there was an existing and operative law capable of being amended.

7. That the rule which puts together a subsequent repealing act and a former act, intended to repeal in the whole or in part that former act, necessarily supposes that there is an existing and operative statute to be effected; otherwise, the supposed repealing act has no force.

GEO. T. CURTIS,

12 Wh 148 *Of Counsel,*

with the Plaintiff in Error.